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In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Acting Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Tax Court (R. 23–31) [1] is reported at 43 T.C. 120. The opinion of the court of appeals (Appendix A, *infra*, pp. 15–36) is not yet officially reported.

[1] "R." references are to Appendix B to the Commissioner's brief in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1966 (Appendix, *infra*, p. 36). On October 4, 1966, Mr. Justice Harlan granted an extension of time within which to file a petition for a writ of certiorari to November 3, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

When the resolution of an issue in a federal estate tax controversy depends upon the character of a property interest owned or transferred by the decedent and the character of such interest has been determined by a State trial court in a proceeding to which the United States was not a party, is the federal court conclusively bound by that decision even though it is contrary to State law?

STATUTES INVOLVED

The relevant portions of § 2056 of the Internal Revenue Code of 1954 are set forth in Appendix B, *infra*, pp. 37–40.

STATUTE INVOLVED

Decedent, a resident of New York, died on April 6, 1957. In 1930, he had created a revocable trust which (as subsequently amended in 1931) directed that the income therefrom be paid to his wife during her life, granted her a general power to appoint the corpus by will to any "persons and/or corporations," and provided for an alternate disposition if she failed to exer-

cise the general power of appointment. On October 25, 1951 (five and one-half years before decedent's death), his wife, seeking to prevent the corpus of the trust from being taxed as part of her gross estate at her death, executed an instrument which purported to release a portion of her general power of appointment and convert it into a special power of appointment. (R. 5–6, 11, 12, 24, 34–44.)

Decedent's executor claimed a marital deduction for the value of the trust at the time of his death, *i.e.*, $70,222. The Commissioner determined that the trust corpus did not qualify for the marital deduction. The executor filed a petition in the Tax Court for a redetermination of the asserted deficiency. In order for the trust to qualify for the marital deduction, decedent's widow must have possessed, at the time of decedent's death, both the right to the income from the trust for her life plus a general power of appointment over the trust assets. 1954 Code, Section 2056(b)(5). Therefore, the Tax Court controversy turned on whether decedent's widow had in 1951 effectively released a portion of her general power of appointment and converted it into a special power of appointment (in which case no marital deduction would be allowable). (R. 3–8, 11, 51.)

While the Tax Court proceeding was pending, the trustee, which was also the executor of decedent's estate, filed a petition in the New York Supreme Court, at least in part for the purpose of affecting the outcome of the Tax Court action, seeking a determina-

tion as to the validity of the widow's October 25, 1951, partial release. Three briefs were filed in that proceeding—one for the trustee, one for Mrs. Bosch, and one by a guardian *ad litem* on behalf of a minor who was a possible beneficiary in the event Mrs. Bosch died without exercising her power of appointment. All three briefs argued that the release was a nullity. No argument to the contrary was presented to the State court. The New York Supreme Court adopted the position maintained in the only briefs before it, and held that the partial release of the general power of appointment was a nullity. (R. 13, 18–19, 25–26, 49–52, 56.)

Without discussing any New York statutes or decisional law, the Tax Court accepted the New York decision "as an authoritative exposition of New York law and adjudication of the property rights involved" (R. 31), and allowed the executor a marital deduction for the entire value of the trust. In so doing, the Tax Court declined to decide whether it was bound by the New York trial court's decision. (R. 26, 31, 32.)

A divided court of appeals affirmed. The majority held that it was conclusively bound by the decision of the State trial court, without regard to whether that decision resulted from a non-adversary proceeding and was incorrect under State law (App., *infra*, pp. 24–26). Judge Friendly, in his dissenting opinion, concluded, after a comprehensive discussion of the problem, that the State trial court's holding that the partial release was a nullity was incorrect. He also rejected the

"mechanical view" adopted by the majority, which would permit the taxpayer to bind the Internal Revenue Service by obtaining a State trial court decision, despite the facts (1) that the parties to the State proceeding had no "genuine controversy," (2) that the State trial court did not have "the benefit of a fair presentation of both sides" of the question, and (3) that the "state court litigation [was] brought primarily to have an effect on federal taxes" (App., *infra*, pp. 27, 29).

REASONS FOR GRANTING THE WRIT

The question of the effect to be given in federal estate tax litigation to a decision of a lower State court characterizing property interests that are determinative of federal estate tax consequences is a recurrent one, of substantial administrative importance.[2] The dissenting opinion below graphically points up the "widespread conflict among the circuits" (App., *infra*, p. 27), and the consequent need for the establishment of guiding principles by this Court, which as Judge Friendly observed, "has not spoken to the point for nearly thirty years" (App., *infra*, p. 27).

1. This Court last addressed itself to the basic issue presented here in *Blair* v. *Commissioner*, 300 U.S. 5,

[2] While most of the cases involve the federal estate tax, the same principles would appear to apply to any federal tax the incidence of which depends upon the characterization of the taxpayer's property interests under State law. For simplicity, however, we refer to the problem herein solely in terms of the federal estate tax.

and *Freuler* v. *Helvering*, 291 U.S. 35. In *Blair*, this Court held that a federal court deciding an issue governed by State law was bound to follow the decision of a State intermediate appellate court where that court, having "reviewed the decisions of the Supreme Court of the State" "reached a deliberate conclusion" (p. 10). In *Freuler*, this Court held that where Congress had provided (in a section of the Code which was subsequently repealed) that the incidence of taxation depended upon an "order" governing distribution of trust income, a federal court was bound to accept the distribution "order" entered by a State trial court, at least where "all the parties [had not] joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax" (p. 45).

2. In the intervening years, conflict has developed among the circuits. As the dissenting judge below observed, two "polar" positions have emerged in the decisions of the courts of appeals. The first, as described by Judge Friendly, is that any judgment of an inferior State court "which is effective as a determination of property rights among the parties is conclusive upon the federal fisc" (App., *infra*, p. 27). This view has been adopted by the Third Circuit[3] and, in the instant case, by the Second Circuit.

[3] See *Darlington's Estate* v. *Commissioner*, 302 F. 2d 693, 694–695 (C.A. 3); *Beecher* v. *United States*, 280 F. 2d 202, 203–204 (C.A. 3); *Babcock's Estate* v. *Commissioner*, 234 F. 2d 837, 841–842 (C.A. 3); *Gallagher* v. *Smith*, 223 F. 2d 218 (C.A. 3),

The Third Circuit has stated its position as follows (*Darlington's Estate* v. *Commissioner, supra,* pp. 694–695):

> * * * [I]f federal law makes federal tax treatment depend, without further qualification, upon who has what rights in an estate under state law, a state court's adjudication which is final in its effect upon those rights must also be taken as final as to the tax matters which depend upon those rights * * * [and for this result to obtain] it is not necessary that the adjudication be the result of a contest in which one party says yes and another no. * * *

The majority opinion below held that when a "party comes into the federal court with his rights already fixed by a decision of a state tribunal * * * [t]here is no occasion to inquire into the general law of the state to ascertain what those rights are" (App., *infra,* p. 23).

Most of the courts of appeals that have considered the question, however, have rejected the rule laid down by the Third Circuit and followed by the Second Circuit in the instant case. Two principal approaches are reflected in these decisions, some courts relying in part on both rationales. A number of decisions have lent support to the view—characterized by Judge Friendly as the other "polar" position—that the judgment of a State trial court characterizing a property interest can never be binding on a federal court in an estate tax proceeding and that where federal estate tax consequences turn upon the character of a property interest held or transferred by the decedent, fed-

eral courts are under a duty to make their own determination of the property interest in accordance with State law as determined by the highest court of the State. According to this view, Congress intended the federal courts to ascertain the character of a taxpayer's property interests under State law in accordance with the approach of the Rules of Decision Act, 28 U.S.C. 1652, whether or not there has been a prior characterization by a State trial court. See, *e.g.*, *Old Kent Bank and Trust Co.* v. *United States*, 362 F. 2d 444, 449 (C.A. 6); *Peyton's Estate* v. *Commissioner*, 323 F. 2d 438, 443 (C.A. 8); *Faulkerson's Estate* v. *United States*, 301 F. 2d 231, 232–233 (C.A. 7), certiorari denied, 371 U.S. 887; *Brainard* v. *Commissioner*, 91 F. 2d 880, 883–884 (C.A. 7).[4]

A majority of the courts of appeals appear to have placed primary reliance on an intermediate approach and to have held that a federal court is not bound by a decree of a State trial court if that decree resulted from a non-adversary proceeding. See *In re Sweet's Estate*, 234 F. 2d 401, 404 (C.A. 10), certiorari denied, 352 U.S. 878; *Faulkerson's Estate* v. *United States*, *supra*, at 233; *Old Kent Bank and Trust Co.*

[4] See also *Second National Bank of New Haven* v. *United States*, 351 F. 2d 489 (C.A. 2), petition for certiorari pending, No. 240, O.T., 1966, where a different panel of the same court held that "under no circumstances can [the decrees of the Connecticut Probate Court] be construed as conclusive and binding upon a federal court in construing and applying the federal revenue laws" (p. 494). In the present case the court distinguished that decision on the ground that a "determination of the Connecticut Probate Court was not authoritative in Connecticut" (App., *infra*, pp. 25–26). We do not, however, think the two decisions can be reconciled in principle.

v. *United States, supra,* at 449–450; *Pierpont* v. *Commissioner,* 336 F. 2d 277, 281 (C.A. 4), certiorari denied, 380 U.S. 908; *Saulsbury* v. *United States,* 199 F. 2d 578, 580 (C.A. 5), certiorari denied, 345 U.S. 906; *Stallworth's Estate* v. *Commissioner,* 260 F. 2d 760, 763 (C.A. 5); *Peyton's Estate* v. *United States, supra,* at 443–444; see also *Stark* v. *United States,* 351 F. 2d 160, 163 (C.A. 6), certiorari denied, 384 U.S. 939. Compare *Newman* v. *Commissioner,* 222 F. 2d 131, 136 (C.A. 9), and *Wolfsen* v. *Smyth,* 223 F. 2d 111, 113–114 (C.A. 9), with *Flitcroft* v. *Commissioner,* 328 F. 2d 449, 453–454 (C.A. 9). According to this view, Congress did not intend non-adversary State court proceedings which involved no genuine controversy between the parties and in which the parties did not present both sides of the question upon which the federal tax turns to be conclusive for federal estate tax purposes. Such proceedings should not be regarded for tax purposes as controlling determinations as to the character of the property interests held or transferred by the decedent at the time of his death; they merely confirm post-mortem agreements unanimously reached by the affected parties with respect to the disposition of the decedent's property. So long as Congress does not generally permit voluntary post-death agreements between a decendent's heirs to affect the computation of a decedent's estate tax liability, the federal courts should not be bound to recognize an uncontested State trial court decree entered in a non-adversary proceeding, which merely ratifies such a post-mortem arrangement.

It is apparent from the foregoing that the instant decision of the Second Circuit and the decisions of

the Third Circuit giving binding effect to State trial court decrees cannot be reconciled with the decisions of the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits declining to give conclusive effect to State court decrees.

3. The decision below is erroneous. Decedent's estate would be entitled to a marital deduction only if, at the time of his death, his widow had a life estate in the trust plus a general power of appointment over the corpus. 1954 Code, § 2056(b)(5). No marital deduction would be allowed if, at the time of her husband's death, she had only a special power of appointment, even if, shortly after his death, all of his other heirs agreed not to assert some of their rights in his estate and voluntarily conceded to her the additional power necessary to give her a general power of appointment. See, *e.g.*, 1954 Code, § 2056(d)(2), (e). In such a case, although the widow might actually have a general power of appointment after the voluntary action of the decedent's heirs, no marital deduction would be allowed because she neither received the general power from her deceased husband (Code § 2056(a), (e)) nor did she have it "at the moment of her husband's death." *Jackson* v. *United States*, 376 U.S. 503, 507–508; see also S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 10 (1948–1 Cum. Bull. 331, 338).[5]

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[5] An exception to this rule is contained in P.L. 89–621, 80 Stat. 872, signed into law on October 4, 1966. This recent amendment to § 2056(d)(2), which is not effective for the years involved here, merely allows a marital deduction in certain limited circumstances where a prompt disclaimer by a legatee other than the decedent's widow has the effect of increasing the bequest to her.

Therefore, in the instant case, decedent's estate should not be entitled to a marital deduction if, at the time of his death, his widow had only a special power of appointment over the trust, and after his death, his heirs, in an effort to save estate taxes, conceded to his widow the additional powers necessary to entitle the estate to a marital deduction, even though the heirs obtained a State trial court's ratification of their action.

After an extensive review of the New York legislation and decisions, Judge Friendly concluded in his dissent that the widow's 1951 release of a part of her general power of appointment was effective under New York law and that the State trial court's decision to the contrary was plainly wrong (App., *infra,* pp. 29–33). The parties to the instant suit concede that all briefs filed in the State trial court "took the same tack or presented the same side of the argument" (R. 19), *i.e.,* that when decedent's widow argued to the State court that her release had been ineffective and that she still had a general power of appointment, "nobody raised a dissenting voice" (R. 19). With all parties arrayed on the same side of the issue, the court was deprived of the benefit of a fair presentation of the merits. As Judge Friendly observed (App., *infra,* p. 33):

> Under these circumstances it is not to be wondered that a judge sitting in the busy motion part of the Supreme Court for New York County should have erroneously ratified the parties' unanimous contention, citing only the inapposite decision of *In re Piffard* * * *.

As the majority of the courts of appeals that have considered the question have held, Congress did not intend that the federal courts hearing estate tax controversies should be conclusively bound by decisions of State trial courts in such circumstances. The conclusion of the lower court—that the federal courts are bound by the State court determination in this case—imputes to Congress an intention to allow a decedent's executor and heirs to manipulate the estate tax burden merely by obtaining judicial ratification of post-mortem intra-family property arrangements. The legislative history of the marital deduction provision, however, makes it clear that Congress did not mean the federal courts to be conclusively bound in such circumstances; it provides that in deciding whether the decedent's spouse received the requisite interest in property from decedent "proper regard should be given to interpretations of the will rendered by a court in *a bona fide adversary proceeding.*" S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 4 (1948–1 Cum. Bull. 331, 333) (emphasis added). Moreover, the estate tax regulations have long provided that—

> If as a result of the controversy involving the decedent's will, or involving any bequest or devise thereunder, a property interest is assigned or surrendered to the surviving spouse, the interest so acquired will be regarded as having "passed from the decedent to his surviving spouse" only if the assignment or surrender was a bona fide recognition of enforceable rights of the surviving spouse in the decedent's estate.

> *Such a bona fide recognition will be presumed where the assignment or surrender was pursuant to a decision of a local court upon the merits in an adversary proceeding following a genuine and active contest.* * * * [Emphasis added.]

Treasury Regulations (1954 Code), § 20.2056(e)–2(d)(2); see also *id.*, § 20.2053–1(b)(2). As Judge Friendly pointed out, the view adopted by the majority below "would permit citizens, unwilling to accept the tax consequences of actions taken by them or their decedents, to evade federal taxes by taking advantage of an unwitting lower state tribunal" (App., *infra*, p. 27). See also *Old Kent Bank and Trust Co.* v. *United States*, *supra*, at 450.

4. The issue presented by the instant case is important and recurring. At least five such cases have been decided by the courts of appeals in the past 13 months.[6] The Third Circuit and the Second Circuit in the instant case apparently consider the decrees of State trial courts to be conclusively binding (see cases cited, *supra*, pp. 6–7), while the other courts of appeals which have passed upon the issue have rejected such a view (see cases cited, *supra*, pp. 8–9). In light of the "widespread conflict among the circuits" (App., *infra*, p. 27) and the importance of the problem in the administration of the revenue laws,

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[6] *Second National Bank of New Haven* v. *United States*, *supra*; *Stark* v. *United States*, *supra*; *Old Kent Bank and Trust Co.* v. *United States*, *supra*; *United States* v. *Farish*, 360 F. 2d 595 (C.A. 5); and the instant case.

this Court should review the decision in the instant case. We are contemporaneously filing a separate memorandum acquiescing in the taxpayer's petition for a writ of certiorari with respect to this issue in *Second National Bank of New Haven* v. *United States*, No. 240, this Term.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER, 1966.

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*In lieu of the Solicitor General, who has disqualified himself.

APPENDIX A

United States Court of Appeals
for the Second Circuit

No. 306—September Term, 1965.

Argued May 25, 1966. Decided July 6, 1966

Docket No. 29883

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR, RESPONDENT

Before FRIENDLY, HAYS, and FEINBERG, Circuit Judges

HAYS, Circuit Judge:

The Commissioner petitions for review of a decision of the Tax Court which held that the Commissioner had erroneously disallowed the sum of $70,222.04 as a marital deduction under Section 2056(b)(5) of the Internal Revenue Code of 1954, 26 U.S.C. § 2056(b)(5).[1] We affirm the Tax Court.

[1] "(5) *Life estate with power of appointment in surviving spouse.*—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, * * * with power in the surviving spouse to appoint the entire interest, * * * (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the in-

The facts are fairly simple and are not in dispute. On April 9, 1930 the decedent set up a trust by the terms of which the income was to be paid to his wife during her lifetime. Upon the death of the wife the corpus was to be paid to the grantor or his estate. The trust was amendable and revocable.

On February 6, 1931 decedent amended the trust instrument to grant to his wife a general power of appointment. She was empowered to appoint by her will the corpus of the trust to any "persons and/or corporations." The amendment provided for a disposition over in the event the wife failed to exercise her power of appointment.

On October 25, 1951, the wife executed a document by which she purported to release a portion of her general power of appointment under the trust and to convert it into a special power of appointment.[2]

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terest, or such specific portion, to any person other than the surviving spouse—

"(A) the interest * * * thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

"(b) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

"This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events."

[2] "KNOW ALL MEN BY THESE PRESENTS:

"WHEREAS I, MARGARET BOSCH, am the life beneficiary of the trust created by a certain Agreement of Trust dated April 9, 1930 between Herman J. Bosch, as Grantor, and Irving Trust Company, as Trustee, which trust is now being administered by said Irving Trust Company as such Trustee; and

"WHEREAS, by an amendment of said Agreement of Trust, dated February 6, 1931, made by said Grantor pursuant to the

It appears from the document itself and it is readily conceded by the trustee, which proposed to Mr. and Mrs. Bosch the execution of the release, that the purpose of the release was to take advantage of the Powers of Appointment Act of 1951, Ch. 165, 65 Stat. 91, amending Int. Rev. Code of 1939, §811(f) (now Int. Rev. Code of 1954, §2041), then recently enacted, and

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power thereby preserved to him, it is provided that in the event that said Grantor shall not survive me, the beneficiary therein named—

"'* * * then upon the death of said Margaret Bosch the Trustee shall pay, transfer and deliver the principal of the trust fund to the persons and/or corporations appointed to receive the same by the Last Will and Testament of Said Margaret Bosch, * * *'

and

"WHEREAS I desire to release in part my contingent power of appointment under said Agreement of Trust in the manner contemplated by the 'Powers of Appointment Act of 1951' amending Section 811(f) and Section 1000(c) of the Internal Revenue Code of the United States of America, so that my said contingent power of appointment under said Agreement of Trust shall not be a general power of appointment,

"NOW, THEREFORE, I, said Margaret Bosch, hereby renounce, relinquish, surrender and release my said contingent power to appoint all or any part of said trust fund by said Agreement of Trust dated April 9, 1930 made by Herman J. Bosch, as amended by instrument dated February 6, 1931, or any property which may hereafter form a part of said trust fund, in favor of myself, my estate, my creditors or the creditors of my estate.

"Any attempted exercise of said power made by my Will which is inconsistent or in any way in conflict with this release and limitation by me of said power shall be void.

"IN WITNESS WHEREOF, I have executed this instrument in duplicate this 25 day of October, 1951.

/s/ MARGARET BOSCH (L.S.)
Margaret Bosch"

thus "to prevent the assets of the trust being taxed as part of Margaret Bosch's estate."

On April 6, 1957 Herman Bosch died. His executor claimed a marital deduction for the value of the trust. The Commissioner determined that the trust did not qualify for the marital deduction and asserted a deficiency in the amount of $70,222.04, the value of the corpus of the trust.

The executor filed a petition in the Tax Court for a redetermination of the deficiency. While the action was pending in the Tax Court, the trustee, which was also executor of the estate of Herman Bosch, brought a proceeding in the New York Supreme Court for a settlement of its account as trustee. In connection with the proceeding in the New York Supreme Court, the trustee asked for a determination of the validity of Mrs. Bosch's release of part of her power of appointment. Respondent stipulated and conceded that the New York proceeding was instituted "at least in part for the purpose of affecting [the] outcome" of the case before the Tax Court. The trustee's petition in the New York court described the proceedings then pending in the Tax Court, and stated the position taken in that proceeding by the executor.

The issue in the state proceeding was whether the release executed by Mrs. Bosch on October 25, 1951 was effective. Three briefs were filed in the New York proceeding, one for Mrs. Bosch, one for the trustee, and one by a guardian *ad litem* in behalf of a minor interested in the trust by reason of being a possible beneficiary in the event Mrs. Bosch died without exercising her power of appointment. All three briefs argued that the release was a nullity. No argument for the validity of the release was presented to the court.

There were twenty-two persons having the same interest as the infant who was represented by the guardian *ad litem*. Although they received notice of the proceeding, none of them appeared.

The state court held that Mrs. Bosch's purported release was a nullity.[3]

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[3] "Matter of Irving Trust Co. (Bosch)—In this proceeding to judicially settle and allow the intermediate account of the trustee under an inter vivos trust, a ruling is requested respecting the validity of an instrument executed by Margaret Bosch, wife of the settlor of the trust, dated October 25, 1951, purportedly partially releasing her contingent power of appointment. On April 9, 1930, Herman J. Bosch created a trust which provided for the payment of income to his wife for her life with a reversion to the grantor if his wife should predecease him, or to his estate if he should predecease his wife, leaving a will, or to his next of kin if he should die intestate. The trust instrument reserved to the grantor the right to alter or amend the trust at any time during his life with the consent of the trustee, and the further right without the consent of the trustee or any other person to revoke the trust in whole or in part. On February 6, 1931, the grantor exercised his right to amend the trust to provide that his wife, Margaret Bosch, should have a general power of appointment over the property of the trust *exercisable by Will* if she survived the grantor. The power in the grantor to further alter, amend or revoke the trust in his lifetime was undisturbed by this amendment. On October 25, 1951, during the lifetime of the grantor, his wife, Margaret Bosch, executed an instrument by which she purported to effect a partial release of the general power of appointment granted to her by the trust instrument as amended. The grantor, Herman Bosch, died on April 6, 1957. The applicable provision of the law is section 183, subdivision 1, of the Real Property Law, which stated: 'Any power which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power in trust which is imperative, is releasable, either with or without consideration, by written instrument signed by the grantee and delivered as hereinafter provided.' This sec-

The Tax Court decided to accept the New York decision and gave the following reasons for doing so:

> 1. The New York court had jurisdiction over the parties and subject matter of the proceeding, and its judgment was final and conclusive as to those parties. Therefore, Mrs. Bosch now has a general power of appointment which she could exercise in favor of herself, her estate, her creditors, or the creditors of her estate.
>
> 2. Decisions of the Supreme Court of the State of New York represent legal precedent for courts throughout the state, unlike decisions

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tion, although a part of the Real Property Law, applies to powers of appointment over personal property as well as to powers over real property (Matter of N. Y. Title & Mortgage Co., 150 Misc. 488; In re Goldwitz Will, 145 Misc. 300; Matter of Cooksey's Estate, 182 N.Y. 92). In order that the donee of a power of appointment release any rights under that power, the donee must have the right to exercise the power at the time the purported release is made. It seems clear that the donee of power of appointment cannot exercise it prior to its creation (Matter of Piffard, 111 N.Y. 410). In the instant case, Margaret Bosch, on October 25, 1951, sought to effect a partial release of the power of appointment over the property of the trust. At that time she lacked the power to exercise any rights under the trust instrument. Her power with respect to the trust instrument came into being upon the death of a grantor on April 6, 1957. A power of appointment created under a revocable deed of trust, which power shall be exercised by will, may not be exercised while the settlor of the trust is still alive. Since she could not have exercised the power of appointment on October 25, 1951, she could not have effected a valid partial release of the power on that date. Hence her purported partial release of the power of appointment on October 25, 1951, was a nullity (Matter of Piffard, *supra*). Accordingly, the purported partial release by Margaret Bosch on October 25, 1951, of the power of appointment granted to her by the trust instrument was a nullity. Settle order." N.Y.L.J., November 15, 1963.

of local courts with limited geographical jurisdiction whose decisions are not binding upon other courts of the state.

3. The Commissioner was fully aware of the proceeding in the New York court and could have sought the opportunity to present his views to that court. Indeed, he agreed to the continuance of the hearing before the Tax Court so that the New York proceeding might be brought to a conclusion.

4. The New York court rendered a reasoned opinion and reached a deliberate conclusion.

5. The New York court's decision, which is binding upon Mrs. Bosch, may have certain offsetting tax consequences in respect to her own estate tax. The New York decree establishing that she has a general power of appointment will result in the inclusion in her gross estate of any property passing under her exercise of that power, and the record indicates that it is not reasonable to assume that this power of appointment will remain unexercised.[4] Thus, the state court decree was more than "a label for past events that would affect the present litigation; it authoritatively determined the nature of the power of appointment with potentially adverse tax consequences at a later date."

The Tax Court stated that it was not necessary for it to say that it was "bound" by the New York decision. It held that it was sufficient to state, for all of the above reasons, that it would accept the New York decision "as an authoritative exposition of New

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[4] The Tax Court said "[W]e cannot reasonably assume that she will permit that power to remain unexercised, for there are indications in the record that the immediate natural objects of her bounty do not include all of the many relatives of her husband who would take in default of her exercise of the power."

York law and adjudication of the property rights involved."

In deciding whether the Tax Court ascribed proper effect to the state decision, a few preliminary observations may be helpful. We believe that much of the confusion in the cases is caused by the failure of the courts carefully to formulate the issue. For example, it is quite clear that the state decision is not binding upon the federal courts because the situation is covered by the principle of *res judicata*. See *Freuler* v. *Helvering*, 291 U.S. 35, 43 (1934). Obviously the Commissioner is not bound by the state decision in a *res judicata* sense, since he was not a party to the litigation which resulted in the decision. It may be that it would be desirable to hold the Commissioner bound when he has received notice and an opportunity to appear as in this case, but that is clearly not the law now, and any such change in the law would no doubt require legislative action. Similarly the federal courts are not bound in this situation by the rule of *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). It is for this reason that most of the Commissioner's argument must be considered to be beside the point. The task here is not to discover the general New York law applicable to releases of powers of appointment. That may well be the subject of the required search in a case which concerns a taxpayer whose own special status under New York law has never been authoritatively determined by a New York tribunal. In the determination of the present case we are not required to take issue with our learned colleague, Judge Friendly, whose brilliant lecture *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383 (1964) is quoted in the Commissioner's Reply Brief. We may indeed agree with him that the

correct view, that "the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law," is set forth by Judge Waterman in *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.*, 234 F. 2d 538, 541 n. 1 (2d Cir. 1956). The reference in the quoted passage is to the great run of cases in which the federal courts are obliged to search out the general principle of state law in order to apply that principle to a case under consideration. It does not refer, and was never intended to refer, to the question of whether or not a federal court is to accept a state determination of the rights under state law of a party to a federal action. In the latter situation, which is that in the case at bar, the party comes into the federal court with his rights already fixed by a decision of a state tribunal. There is no occasion to inquire into the general law of the state to ascertain what those rights are.

The issue is, then, strictly speaking, not whether the federal court is "bound by" the decision of the state tribunal, but whether or not a state tribunal has authoritatively determined the rights under state law of a party to the federal action.

This is clearly the effect of *Sharp* v. *Commissioner*, 303 U.S. 624 (1938), reversing, 91 F. 2d 802 (3d Cir. 1937), *Blair* v. *Commissioner*, 300 U.S. 5 (1937) and *Freuler* v. *Helvering*, 291 U.S. 35 (1934). In the *Blair* case, the issue was whether a certain trust was a spendthrift trust under the law of Illinois. The Circuit Court of Appeals, examining the general law of Illinois on the subject, held it to be a spendthrift trust. The trustees thereupon brought an action in the Illinois courts to obtain a construction of the will and the Appellate Court of Illinois, an intermediate appellate court, held that the trust was not a spend-

thrift trust. The United States Supreme Court ruled that the Commissioner was required to accept the Illinois decision as dispositive. The Court said:

> "In this instance, it is not necessary to go beyond the obvious point that the decision was in a suit between the trustees and the beneficiary and his assignees, and the decree which was entered in pursuance of the decision determined as between these parties the validity of the particular assignments." 300 U.S. at 10.

In deciding whether the determination of the rights under state law of a party to a federal action has been authoritative, the majority of federal courts in which the question has been raised have refused to accept the result in cases which were non-adversary.[5] However, there is very respectable authority for the proposition that, if the state decision is binding on the parties as to their rights under state law (as it would not be if it resulted from fraud or collusion), it is conclusive as to those rights for purposes of federal

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[5] See the discussion and the cases cited in the following: 10 Mertens, *Law of Federal Income Taxation*, Ch. 61 (Zimet Revision 1964); Braverman and Gerson, *The Conclusiveness of State Court Decrees in Federal Tax Litigation*, 17 Tax L. Rev. 545 (1962); Colowick, *The Binding Effect of a State Court's Decision in a Subsequent Federal Income Tax Case*, 12 Tax L. Rev. 213 (1957); Holzman, *Impact of State Law upon Fed. Tax.*, 42 Taxes 240 (1964); Sacks, *Binding Effect of Nontax Litigation in State Courts*, N.Y.U. 21st Inst. on Fed. Tax., 277 (1963); Stephens & Freeland, *The Role of Local Law and Local Adjudication in Federal Tax Controversies*, 46 Minn. L. Rev. 223 (1961); Note, *Binding Effect of a Nonadversary State Court Decree in a Federal Tax Determination*, 33 Fordham L. Rev. 705 (1965); Note, *Effect of State Court Decrees in Federal Tax Litigation*, 30 U. of Chi. L. Rev. 569 (1963); Note, *The Role of State Law in Federal Tax Determination*, 72 Harv. L. Rev. 1350 (1959).

taxation. In *Gallagher* v. *Smith*, 223 F. 2d 218, 223 (3d Cir. 1955), the court said:

> "An adjudication of such a question of title by a court of the state must accordingly be given effect, not because it is res judicata against the United States, but because it is conclusive of the parties' property rights which alone are to be taxed. So far as those parties are concerned the law of the state is what the state court has declared and applied in their case. If the state court's judgment has binding final effect under the state law the rights of the parties can only be what the court has held them to be. It is for this reason that the federal court should not in a case of this kind make an independent examination and application of state law. For if it reaches a different conclusion from the state court as to what the parties' rights should be under the state law its decision will not change those rights which will necessarily remain what the state court has declared them to be."

See *Flitcroft* v. *Commissioner*, 328 F. 2d 449 (9th Cir. 1964); *Estate of Darlington* v. *Commissioner*, 302 F. 2d 693 (3d Cir. 1962); *Eisenmenger* v. *Commissioner*, 145 F. 2d 103 (8th Cir. 1944); *Sharpe* v. *Commissioner*, 107 F. 2d 13 (3d Cir. 1939), cert. denied, 309 U.S. 665 (1940).

It may fairly be said, we think, that the question is an open one in this circuit. (However, compare *Kelly's Trust* v. *Commissioner*, 168 F. 2d 198 (2d Cir. 1948).) The decision in *Second National Bank* v. *United States*, 351 F. 2d 489 (2d Cir. 1965), was based, as the court makes clear,[6] on the holding that the de-

[6] "The trial court after carefully considering the arguments and the many relevant decisions concluded that 'the decrees of the Connecticut Probate Court—which is not a court of record and most of the judges of which are laymen, not lawyers—

termination of the Connecticut Probate Court was not authoritative in Connecticut.

An able Tax Court judge quite explicitly undertook to balance several relevant factors (see pp. 2494–2495 *supra*) before deciding to accept the New York judgment as authoritative of the rights of parties. We, too, have considered all of the circumstances and feel that the decision below was correct. We hold that the New York judgment, rendered by a court which had jurisdiction over parties and subject matter, authoritatively settled the rights of the parties, not only for New York, but also for purposes of the application to those rights of the relevant provisions of federal tax laws. Mrs. Bosch now has a general power of appointment under the trust. The corpus of the trust therefore qualifies for the marital deduction.

The decision of the Tax Court is affirmed.

FRIENDLY, Circuit Judge (dissenting):

The Commissioner's appeal concerns an important problem in the administration of the revenue laws—the conclusiveness of a judgment of a lower state

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under no circumstances can be construed as binding and conclusive upon a federal court in construing and applying the federal revenue laws.' 222 F. Supp. at 457. This court is in accord with the trial court's conclusion as to the effect of the state decree, see *Estate of Peyton* v. *Commissioner*, 323 F. 2d 438 (8th Cir. 1963), since under Connecticut law the Probate Court's decisions are not binding on the state's higher courts, *Heiser* v. *Morgan Guaranty Trust Co.*, 150 Conn. 563, 192 A. 2d 44 (1963), and are even subject to collateral attack in another probate district, Culver's Appeal from Probate, 48 Conn. 165, 172–174 (180). Under the circumstances, it was necessary 'to make a finding as to whether the proceedings in the Probate Court were collusive or nonadversary in nature' and the court properly refrained from so doing." 351 F. 2d at 494.

court, typically in an intra-family setting, that determines property interests entailing federal tax consequences. The Supreme Court has not spoken to the point for nearly thirty years. Difficulties arise because of the practical unacceptability of the strictly logical polar positions; that the judgment of an inferior state court not binding as *res judicata* can never be more than rebuttable evidence of state law, and that any such judgment which is effective as a determination of property rights among the parties is conclusive upon the federal fisc. The former position could operate unfairly in the many cases where persons having a genuine controversy over property rights desire resolution by an appropriate local tribunal without wishing to press their differences to the highest court of the state. The latter would permit citizens, unwilling to accept the tax consequences of actions taken by them or their decedents, to evade federal taxes by taking advantage of an unwitting lower state tribunal.

The compounding of factual variables, the somewhat intractable nature of the problem, and the cryptic character of the Supreme Court's rather dated pronouncements, see *Freuler* v. *Helvering,* 291 U.S. 35, 43–47 (1934); *Blair* v. *C. I. R.,* 300 U.S. 5, 9–10 (1937); and *Sharp* v. *C. I. R.,* 303 U.S. 624 (1938), have created widespread conflict among the circuits. *Contrast,* e.g., *Saulsbury* v. *United States,* 199 F. 2d 578 (5 Cir. 1952), cert. denied, 345 U.S. 906 (1953); *Stallworth's Estate* v. *C. I. R.,* 260 F. 2d 760 (5 Cir. 1958); *Sweet's Estate* v. *C. I. R.,* 234 F. 2d 401 (10 Cir.), cert. denied, 352 U.S. 878 (1956); and *Faulkerson's Estate* v. *C. I. R.,* 301 F. 2d 231 (7 Cir.), cert. denied, 371 U.S. 887 (1962), refusing to give effect to state judgments, *with Gallagher* v. *Smith,* 223 F. 2d

218 (3 Cir. 1955); *Darlington's Estate* v. *C. I. R.*, 302 F. 2d 693 (3 Cir. 1962), and *Goodwin's Estate* v. *C. I. R.*, 201 F. 2d 576 (6 Cir. 1953), doing the opposite. The Fourth Circuit has declined to give effect to a lower state court judgment with a respect to a widow's power of appointment rendered under circumstances quite similar to those here, *Pierpont's Estate* v. *C. I. R.*, 336 F. 2d 277, 281–82 (1964), cert. denied, 380 U.S. 908 (1965), distinguishing its earlier decision in *Pitts* v. *Hamrick*, 228 F. 2d 486 (1955), and expressly refusing to follow the rule of the Third Circuit which my brothers adopt. The Eighth Circuit seems to be less deferential to state judgments now than it used to be. *Contrast Straight's Trust* v. *C.I.R.*, 245 F. 2d 327 (1957) and *Peyton's Estate* v. *C. I. R.*, 323 F. 2d 438 (1963), *with Helvering* v. *Rhodes' Estate* 117 F. 2d 509 (1941); and *Eisenmenger* v. *C. I. R.*, 145 F. 2d 103 (1944). The Ninth Circuit appears to be more so. *Contrast Flitcroft* v. *C. I. R.*, 328 F. 2d 449 (1964), *with Newman* v. *C. I. R.*, 222 F. 2d 131 (1955), and *Wolfsen* v. *Smyth*, 223 F. 2d 111 (1955). The conflict among the judges is echoed among the commentators. Most of them disapproved the acquiescent attitude now identified with the Third Circuit. See, e.g., Cardozo, Federal Taxes and the Radiating Potencies of State Court Decisions, 51 Yale L. J. 783 (1942); Cahn, Local Law in Federal Taxation, 52 Yale L. J. 799, 818–19 (1943); Oliver, The Nature of the Compulsive Effect of State Law in Federal Tax Proceedings, 41 Calif. L. Rev. 638 (1953); Stephens and Freeland, The Role of Local Law and Local Adjudications in Federal Tax Controversies, 46 Minn. L. Rev. 223, 242–51 (1961); Braverman & Gerson, The Conclusiveness of State Court Decrees in Federal Tax Litigation, 17 Tax L.

Rev. 545 (1962); Note, Effect of State Court Decrees in Federal Tax Litigation: A Proposal for Judicial Reform, 30 U. Chi. L. Rev. 569 (1963); Sacks, The Binding Effect of Nontax Litigation in State Courts, N.Y.U. 21st Inst. on Fed. Tax. 277 (1963). But the Third Circuit also has a defender. See Note, The Binding Effect of a Nonadversary State Court Decree in a Federal Tax Determination, 33 Fordham L. Rev. 705 (1965). With our own court uncommitted,[1] I regret my brothers' vote to align themselves with the rather mechanical view of the Third Circuit rather than the more realistic one of the Fourth and Fifth, thereby needlessly handicapping the Commissioner in the fair and equal enforcement of the federal revenue laws. I would hold that when it is evident that state court litigation has been brought primarily to have an effect on federal taxes, the judgment of an inferior state court adjudicating property rights is entitled to little weight, and that when the state court has not had the benefit of a fair presentation of both sides of the controversy, it is entitled to none. While these principles will not resolve all cases, they are ample to decide this one.

When Herman Bosch died in 1957, the critical date for determining taxes on his estate, his wife had only a special power of appointment over the trust whose status is here in question. Admittedly this was all she purported to have and all she or her husband thought she had. So long as Mr. Bosch lived, no one

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[1] The decision in *Kelly's Trust* v. *C. I. R.*, 168 F. 2d 198 (2 Cir. 1948), is inapposite in my view since the deference given to the state court adjudication was on the basis that its "appeal made it adversary, . . . especially as, on appeal from the state-court judgment, one judge dissented." 168 F. 2d at 198–99.

had questioned the validity of the partial release of the quondam general power, least of all the experienced attorneys who had recommended it. Nor was there any basis for doing so. There had indeed been New York decisions that a power of appointment by will, whether or not contingent on the donee's surviving the donor, could not be released since this would defeat the purpose of preserving the donee's freedom of action until death. *Learned* v. *Tallmadge,* 26 Barb. 443 (1856); *Farmers' Loan and Trust Co.* v. *Mortimer,* 219 N.Y. 290 (1916). But, upon enactment of the Revenue Act of 1942, thenceforth taxing all property subject to a preexisting general power of appointment unless this was released by a specified date,[8] New York's legislature moved swiftly to permit holders to rid themselves of such powers in whole or in part. The statute, Real Property Law § 183, was phrased in the broadest terms:

> "Any power which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power in trust which is imperative, is releasable * * * with respect to the whole or any part of the property subject to such power and may also be released in such manner as to reduce or limit the persons or objects, or classes of persons or objects, in whose favor such power would otherwise be exercisable."

Nothing in the language suggests a desire to except powers that were, like Mrs. Bosch's, contingent on the

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[8] Initially this was January 1, 1943, 56 Stat. 944. Later Congress successively granted postponements until November 1, 1951, and made clear that a partial release would qualify. See Powers of Appointment Act of 1951. 65 Stat. 91; S. Rep. No. 382, 82d Cong., 1st Sess. 2–8, 1951 U.S. Code Cong. & Ad. News 1530–37; Int. Rev. Code of 1954, § 2041(a)(1).

donee's surviving the settlor or destructible by the settlor's amending or revoking the trust;[9] "exercisable" would not normally be read as including only cases where the exercise would be effective if the donee died the next minute. And there was no reason why New York's legislature should thus fail in part to enable its citizens to do what Congress contemplated they might. Unless such a contingent power was partially released before the end of the grace period accorded by Congress, the settlor's death would leave the donee in the same unenviable position as any other holder of a general power created on or before October 21, 1942, where any exercise, although in favor of persons other than the donee, his estate, or their creditors, would result in the inclusion in his estate of the property over which he held the power—just what the release here suggested by the trustee in October 1951 was meant to avoid. Since there is no apparent reason why the New York legislature should have wished to discriminate against holders of contingent or revocable powers and the language affords no indication that it did, it is not surprising that what appears to be the only New York case raising the problem in a truly adversary context held that the contingent nature of a power of appointment, in that instance upon death of the donee without issue, did not prevent release under § 183, *In re Woodcock's Will,* 19 Misc. 2d 268, 186 N.Y.S. 2d 447,

[9] We have been cited to no New York cases that had ever drawn this distinction. The one New York case cited by the Supreme Court Justice, *In re Piffard*, 111 N.Y. 410 (1888), held that although a power of appointment granted by will could not have been exercised as such by a donee who predeceased the testator, the latter's will should be read as incorporating the legatee's disposition.

450 (Surr. Ct. Westchester Co. 1959).[10] This was the unpropitious background in which the attorneys who had counseled that Mrs. Bosch convert her general power into a special one in 1951 determined to engage in what the Commissioner has aptly characterized as *post mortem* estate planning, regaining for her through the New York courts a general power she no longer had at Mr. Bosch's death.

The only reason advanced by the trustee for seeking a declaration as to the validity of the release was the effect on the trust's liability for its share of the taxes on Mr. Bosch's estate—allegedly only $930 if the release was not valid but $21,479 if it was. The trustee's petition to the New York court gave no reason why determination of that question by the Tax Court in the litigation there pending would not fully protect it. The brief for Mrs. Bosch, joining in the trustee's request that the release be declared invalid, made no suggestion that she desired to avail herself of the released power to appoint by will to herself, her estate or her creditors. Indeed, her regaining the general power made it less likely that she would exercise it in any respect. Under the Internal Revenue Code of 1954, § 2041(a)(1), while

[10] Any shadow of doubt has been dissipated by § 146 of the new Article 5 of the Real Property Law, added by Laws 1964, c. 864, effective June 1, 1965, which was not called to the attention of the Tax Court—or to us. This section provides that the donee of a power not presently exercisable cannot contract to make an appointment but "the provisions of this section shall not, in any way, abridge the ability of the donee of a power of appointment not presently exercisable, to release his power, in whole or in part, pursuant to the provisions of section one hundred and forty-three * * *" Section 143 is old § 183. It is thus apparent that no other New Yorker in Mrs. Bosch's situation can ever obtain a ruling like that made here.

any exercise of the power would cause the trust property to be included in her estate, failure to exercise it would produce the optimum result of availability of the trust property for the marital deduction in Mr. Bosch's estate and freedom from taxation in his widow's—a feat which could not have been accomplished by revocation of the trust during Mr. Bosch's life. In default of appointment the trust was to be divided equally between the then next of kin of the two spouses; the interest of the many persons cited as presumptive remaindermen, taken as a class, thus also favored a declaration of invalidity which would make exercise in favor of Mrs. Bosch's relatives less likely, as was conceded in the brief filed by a guardian *ad litem* for a relative of Mr. Bosch, the only remainderman to take a position. Mrs. Bosch in no way indicated that if the release was held valid, she would exercise her special power in favor of any particular person, who might thus be interested in urging validity. The briefs, filed by the trustee, Mrs. Bosch and the guardian, treated the invalidity of the release as almost beyond reasonable debate. The attorneys for the trustee did not inform the court on what basis they had recommended action in 1951 which they now considered so plainly a nullity—something as to which they would have been questioned sharply in a truly adversary proceeding. The sole relevant authority, *In re Woodcock's Will, supra,* was not cited, and the legislative purpose behind § 183 was not explored. Under these circumstances it is not to be wondered that a judge sitting in the busy motion part of the Supreme Court for New York County should have erroneously ratified the parties' unanimous contention, citing only the inapposite decision in *In re Piffard,* see n. 3.

The case thus fits perfectly the description cited by way of contrast in *Freuler* v. *Helvering, supra,* where "all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional * * * tax." 291 U. S. at 45. The problem in this area has been bedeviled by iteration of terms such as "collusive" or "non-adversary." To require proof of collusion in the normal sense of prearrangement would impose a nigh impossible burden on the Commissioner; yet a court shrinks from using such an opprobrious epithet when no prearrangement has been shown. Again, while a proceeding in which, for example, a life tenant with what appears to be a limited right to invade principal seeks a declaration of absolute ownership is surely "adversary" in a formal sense, it may not be in a practical one, as when the life tenant is an aged mother seeking to qualify a bequest for the marital deduction and the remaindermen are her adult sons. See *Peyton's Estate* v. *C. I. R., supra,* 323 F. 2d 438. What makes this case so easy is that the state court proceeding had no significant purpose other than the reduction of tax liability; Mrs. Bosch was not shown to have the slightest intention of using the general power the New York court was led to thrust upon her, or even the special one if she was held to have only that. In a practical sense the decision was thus devoid of any effect except on taxes.[11] There was no

[11] It is immaterial that if Mrs. Bosch should choose to exercise the power in favor of her own relatives, she would subject her estate to a tax—apparently much smaller than the sum here at issue—which would have been saved if the release had not been attacked. The *post mortem estate* planning condemned in *Pierpont's Estate* v. *C. I. R., supra,* 336 F. 2d 277, and *Peyton's Estate* v. *C. I. R., supra,* 323 F. 2d 438, would also have increased the estate tax payable on the widow's death.

question affecting the integrity of the corpus, as in *Freuler,* or the assignability of the beneficiary's right to income, as in *Blair* v. *C. I. R., supra.* In such a case the considerations for respecting the determination of a lower court which is not the product of a weighing of opposing arguments approach zero.[12] One well-considered article has said: "Whenever all parties to the state court proceeding approve and have never opposed the proffered result, and the decree embodying it appears to serve no purpose other than to avoid federal taxation, the decree should not be regarded as determinative of the state law property rights purportedly adjudicated." Braverman & Gerson, *supra,* 17 Tax L. Rev. at 576. Another comment suggests that "If a taxpayer, intending to avoid tax liability, institutes a state suit, and if no interested party presents the argument urged by the Commissioner, then the state court judgment should be considered to have been collusively obtained." Note, *supra,* 30 U. Chi. L. Rev. at 581. A third proposes that a state court adjudication of property rights be respected "unless it was obtained by collusion, i.e.,

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[12] I fail to see the significance attributed by my brothers to the Commissioner's knowledge of the New York proceeding or his courtesy in awaiting its outcome. For twenty years the announced policy of the Internal Revenue Service, surely well known to the appropriate committees of Congress, has been not to intervene in such suits and to move to dismiss if made a party. Mim. 6134 (1947). The reasons are obvious—insufficient staff, unfamiliarity with state procedures, and lack of standing to intervene and thus to appeal unless, indeed, the Commissioner were to concede the very point of the conclusiveness of the state judgment which he properly disputes. In the absence of contrary congressional direction the United States is entitled to litigate liability for federal taxes in its own courts. Compare *Leiter Minerals, Inc.* v. *United States,* 352 U.S. 220 (1957).

for the sole and single purpose of defeating the federal tax imposed upon those rights." Sacks, *supra*, N.Y.U. 21st Inst. on Fed. Tax. at 295. It is unnecessary to choose among these formulations; all call for reversal here.

JUDGMENT

United States Court of Appeals, Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of July one thousand nine hundred and sixty-six.

Present: Hon. HENRY J. FRIENDLY, Hon. PAUL R. HAYS, Hon. WILFRED FEINBERG, Circuit Judges.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR, RESPONDENT

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

A true copy,
/s/ A. Daniel Fusaro,
Clerk.

APPENDIX B

Internal Revenue Code of 1954:

SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

(a) *Allowance of Marital Deduction.*—

For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) *Limitation in the Case of Life Estate or Other Terminable Interest.*—

(1) *General rule.*—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest.

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

* * * * *

(5) *Life estate with power of appointment in surviving spouse.*—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * * * *

(c) *Limitation on Aggregate of Deductions.*—

(1) *General rule.*—The aggregate amount of the deductions allowed under this section (computed without regard to this subsection) shall not exceed 50 percent of the value of the ad-

justed gross estate, as defined in paragraph (2).

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(d) *Disclaimers.*—

* * *

(2) *By any other person.*—If under this section an interest would, in the absence of a disclaimer by any person other than the surviving spouse, be considered as passing from the decedent to such person, and if a disclaimer of such interest is made by such person and as a result of such disclaimer the surviving spouse is entitled to receive such interest, then such interest shall, for purposes of this section, be considered as passing, not to the surviving spouse, but to the person who made the disclaimer, in the same manner as if the disclaimer had not been made.[1]

(e) *Definition.*—For purposes of this section, an interest in property shall be considered as passing from the decedent to any person if and only if—

(1) such interest is bequeathed or devised to each person by the decedent;

(2) such interest is inherited by such person from the decedent;

(3) such interest is the dower or curtesy interest (or statutory interest in lieu thereof) of such person as surviving spouse of the decedent;

(4) such interest has been transferred to such person by the decedent at any time;

(5) such interest was, at the time of the decedent's death, held by such person and the decedent (or by them and any other person) in joint ownership with right of survivorship;

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[1] Section 2056(d)(2) was amended by P.L. 89-621, which became law on October 4, 1966. See fn. 5, *supra*, p. 10.

(6) the decedent had a power (either alone or in conjunction with any person) to appoint such interest and if he appoints or has appointed such interest to such person, or if such person takes such interest in default on the release or nonexercise of such power; or

(7) such interest consists of proceeds of insurance on the life of the decedent receivable by such person.

Except as provided in paragraph (5) or (6) of subsection (b), where at the time of the decedent's death it is not possible to ascertain the particular person or persons to whom an interest in property may pass from the decedent, such interest shall, for purposes of subparagraphs (A) and (B) of subsection (b)(1), be considered as passing from the decedent to a person other than the surviving spouse.

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